IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
PAUL WESLEY BAKER,
Defendant and Appellant.

S170280

Los Angeles County Superior Court
LA045977

February 1, 2021

Chief Justice Cantil-Sakauye authored the opinion of the Court, in which Justices Corrigan, Liu, Cuéllar, Kruger, Groban and Hull* concurred.

Justice Liu filed a concurring opinion.

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* Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PEOPLE v. BAKER

S170280

Opinion of the Court by Cantil-Sakauye, C. J.

Judy Palmer told a friend that she was afraid of defendant Paul Wesley Baker and that "if anything happened to her," "he did it." Within a few weeks, Palmer disappeared. Her body was found in the desert several weeks later, severely decomposed. A jury convicted defendant of first degree murder, among several other offenses. The jury also found true two special circumstance allegations — rape and burglary — and returned a verdict of death at the close of the penalty phase. This appeal is automatic. Aside from correcting an error in the abstract of judgment, we affirm.

I. BACKGROUND

A. Guilt Phase

This case involves three sets of charged offenses. The first concerns Judy Palmer. A jury convicted defendant of first degree murder (count 1); forcible rape (count 2); first degree residential burglary (count 3); grand theft auto (count 4), regarding a Ford Escort that Palmer's son provided for her use; unlawful driving or taking of a vehicle (count 5), regarding the same automobile; and unlawful driving or taking of a vehicle (count 14), regarding a Ford Ranger loaned to Palmer by her employer after the Escort disappeared. (Pen. Code, §§ 187, subd. (a) [murder], 261, subd. (a)(2) [rape], 459–460 [burglary], 487, subd. (d)(1) [grand theft]; Veh. Code, § 10841, subd. (a) [unlawful driving or taking].) The jury found defendant not

guilty of sexual penetration by foreign object (count 15). (Pen. Code, § 289, subd. (a)(1).) In connection with the murder, the jury found true two special circumstance allegations (rape and burglary) and found not true one additional special circumstance allegation (sexual penetration by foreign object). (*Id.*, § 190, subd. (a)(17)(C) [rape], (a)(17)(G) [burglary], (a)(17)(K) [foreign object].) The jury also found that the rape (count 2) was committed during a residential burglary and found true a multiple victim allegation. (*Id.*, § 667.61.)

The second set of charged offenses concerns crimes that the jury found defendant committed against women other than Palmer: forcible rape (count 6) and sodomy by use of force (counts 7 and 16) regarding Kathleen S.; and sodomy by use of force (count 10) regarding Lorna T. (Pen. Code, §§ 261, subd. (a)(2) [rape], 286, subd. (c)(2) [sodomy].) The jury found true a multiple victim allegation in connection with each of these offenses. (*Id.*, § 667.61.) The jury also found true a great bodily injury allegation in connection with the rape offense (count 6) and one sodomy offense (count 7) concerning Kathleen S.

The third and final set of charged offenses concerns crimes, regarding women other than Palmer, of which defendant was acquitted. The trial court entered a judgment of acquittal regarding the alleged forcible rape of Monica H. (count 12) after she did not appear to testify. (See Pen. Code, § 1118.1.) The jury acquitted defendant of two counts of sodomy by force (counts 9 and 13) regarding Laura M. and one count of forcible rape (count 11) regarding Susanne K. The operative charging document did not include a count 8.

1. Prosecution case

a. Relationship between Palmer and defendant

Judy Palmer was a sixty-year-old grandmother at the time of her disappearance on April 17, 2004. She was an active participant in Alcoholics Anonymous (A.A.), sober for nearly 28 years, and "dedicated a large amount of her time to helping" others in the program.

Palmer met defendant through A.A. He was roughly 17 years her junior and very strong. Testimony suggested that the pair became friends around 2000, began dating no sooner than 2001, and started living together in Palmer's apartment no later than 2002. The relationship was on-again, off-again. It appears Palmer and defendant separated at some point in 2003 and reconciled by early 2004.

Defendant worked as a handyperson to earn a living. In early 2004, Palmer's son Robert hired defendant to perform work in Robert's home, at defendant and Palmer's request. Defendant was dissatisfied with the compensation he received and told Robert "he could really hurt my mom."

On March 11, 2004, there was an incident at a storage facility. Palmer and defendant shared a storage unit beginning around September 2003. A manager at the facility saw defendant there several times without Palmer; the manager recalled him having visited "pretty much every day" since the unit had been rented, often with his dog. At some unspecified time before March 11, defendant appeared without the dog, and the manager inquired about it. The manager testified that defendant said, " '[s]he's got it and if I ever want the dog back, I'll probably have to kill her to get it.' " The manager understood defendant to be referring to Palmer.

Palmer appeared at the storage facility in person to make a payment on March 11. Initially, defendant did not seem to be with her. The manager told her that defendant " 'made a remark that if he wanted [the dog] back, he would have to kill you for it.' " The manager testified that Palmer looked at her and started shaking. Defendant appeared immediately after the manager's comment. The manager told him she thought his comment about the dog referred to Palmer. Defendant grabbed Palmer "and just kind of pinched her real hard"; the manager related that Palmer "kept looking at me real scared."

Palmer's birthday was around that time. Her daughter Tammy hosted a birthday party on approximately March 11 or 12. Palmer was sitting at a table. Defendant came up behind her and laid his forearm and fist in front of her. She flinched. According to Tammy, defendant said, " 'I know you want to marry me.' And [Palmer] said, 'the hell I do.' " Defendant, laughing, asked, " 'Why don't you tell her what I gave you for your birthday?' " When Palmer did not reply, he added, " 'Come on. Come on. Tell her what I gave you. It's pretty and it's pink.' " Defendant continued laughing. Palmer sat silently, then retreated to the bathroom, crying. Other evidence adduced at trial supported an inference that the pink item to which defendant referred was a vibrator relevant to the sexual penetration by foreign object count and special circumstance allegation. Palmer had told Tammy years earlier that sex toys "grossed her out" and "demeaned the act of making love."

Within a few days of the party, Palmer told Tammy that she (Palmer) and defendant were having problems and that she did not want him in her apartment anymore. Tammy's understanding was that defendant moved out some time during the week following the party and "was out on the street."

Palmer's relationship with defendant had ended by early April 2004. On April 3 — two weeks before Palmer disappeared — defendant called Tammy's home landline telephone. Tammy described him as "very frantic to speak to" Palmer. Although Palmer was present, Tammy refused. Tammy and Palmer had previously discussed Palmer "trying very hard not to see" defendant; he had been calling Palmer and "showing up at places," including Palmer's home. After Tammy hung up the landline, her cell phone rang. It was defendant, again. She refused to let him speak with Palmer, again. Palmer nodded, suggesting agreement with the refusal. At some point, Palmer remarked, "I wish the asshole would leave me alone" — the kind of language Tammy said Palmer used only when "very angry."

On April 5, defendant was arrested in Palmer's apartment and taken into custody. Palmer's hearsay statement, admitted only as relevant to the state of mind of the testifying officer, indicated that defendant had forced himself into her apartment; other hearsay, admitted without at least contemporaneous limitation, was to similar effect. Trial testimony indicated that officers responded at around 10:00 p.m. that night to a call regarding a domestic disturbance. After they entered Palmer's apartment, defendant removed a narcotics pipe from a pocket of his shorts. He was arrested for possession of that paraphernalia. Officers also recovered a set of keys to Palmer's apartment from his underwear. Two days after the incident, on April 7, defendant was served with a restraining order restricting his contact with Palmer. At some point around this time, roughly between April 3 and April 10, Palmer told a friend "that she was afraid of him and that if anything happened to her that — to look at him, that he did it."

b. Events preceding Palmer's disappearance

Defendant was released from custody shortly after 4:00 p.m. on Wednesday, April 14, 2004. A Ford Escort that Palmer's son Robert provided for her use went missing by the next day. That vehicle is the one at issue in counts 4 (grand theft auto) and 5 (unlawful driving or taking).

Palmer called her boss on Thursday, April 15, and informed him that she lacked transportation to work. Her boss loaned her a white 2002 Ford Ranger pickup truck used by the company that employed them. That truck is the vehicle at issue in count 14 (unlawful driving or taking). At the time the truck was loaned to Palmer, it had a metal toolbox with "a diamond-plate type finish." Palmer decided to park it away from her regular parking spot, fearing that defendant, whom she believed had stolen the Escort, would steal the Ranger as well.

That same day, around 10:00 or 10:30 a.m., defendant called his acquaintance Daniel Mengoni. Mengoni and defendant had used substances together "[a] dozen" times, "maybe more," including cocaine and alcohol. Defendant informed Mengoni that he (defendant) had a car for him (Mengoni). Mengoni was to pay for the car with drugs. Defendant turned over the car before noon. It was a white Ford Escort in good condition, with "women's clothes in the trunk and A.A. material." Mengoni gave defendant about $50 worth of crack, hoping to use the car for at least a day. Defendant gave Mengoni a key and informed him that he (defendant) "never" wanted the car back.

The next night (Friday, April 16), around 9:00 p.m., Mengoni was pulled over while driving the car. Police arrested him and told him that the car was stolen. He recalled telling

the arresting officers that he had received the Escort from defendant. An officer called Palmer's son Robert at approximately 10:00 p.m. that night to inform him that the missing Escort had been recovered.

c. Palmer's disappearance

Palmer was last seen alive by friends and family on Saturday, April 17, 2004. She went to work that day. At some point, she spoke with Robert. They arranged to meet the next day to retrieve the impounded Escort.

Between 4:00 and 5:00 p.m. on the 17th, while in her apartment, Palmer called the friend to whom she had earlier conveyed that "if anything happened to her . . . he did it." During the call, Palmer reiterated that "she was afraid that [defendant] was going to come and hurt her and she didn't know what she should do."

At about 5:00 p.m., Palmer spoke with her daughter Tammy. They decided to have dinner together. Palmer drove to Tammy's in the Ford Ranger, arriving near 6:00 p.m. Palmer was "quiet" and not herself. She told Tammy that "she was really trying to stay away from" defendant. At some point, Palmer cried.

Palmer left for her apartment, which was about a ten-minute drive away, at around 8:00 p.m. Before departing, she and Tammy agreed that Palmer would pick up Tammy's sons the next day for an outing.

On Sunday, April 18, however, there was no word from Palmer. When Tammy called Palmer, she received no answer. When she drove to Palmer's apartment complex, she could not find the truck Palmer had been driving, even though she knew to look outside of the normal parking spot. Tammy eventually

went to Palmer's apartment unit. She knocked on the door, yelling, but again received no answer. At approximately the same time, Robert arrived at the place that he and Palmer had agreed to meet to retrieve the impounded car. Palmer did not appear. Tammy filed a missing persons report that day.

d. Defendant's whereabouts the night Palmer disappeared

The timeline evidence least dependent on human memory suggested that defendant was at the aforementioned storage facility as late as about 6:00 p.m. on Saturday, April 17. That facility assigned a unique pin code to each customer account. A code was required to enter past the facility's gate, and to exit, if leaving in an automobile rather than on foot. A computer-generated log indicated that the pin code associated with defendant's and Palmer's account was inputted in an attempt to exit the facility at 5:01 p.m. and 6:07 p.m. on Saturday, April 17. The pin code was suspended at that time due to nonpayment, and, thus, would not operate the gate. The manager confirmed that it was possible for someone without a functional pin code to follow someone into the facility and need to wait until someone else was leaving to exit. The record does not reveal precisely when the person who inputted the pin code left the storage facility.

Defendant's acquaintance John Woodard testified that defendant appeared at Woodard's home later that night. Woodard told the police that defendant arrived around 9:30 p.m. Defendant was driving "a white Ford Ranger, late model," which Woodard, a self-described "Ford Ranger person," had never seen defendant drive before. (Recall that two days prior, Palmer's boss had loaned her the 2002 Ford Ranger at issue in count 14.) Defendant parked in a location hidden from street traffic, which

he had not done previously. Woodard understood defendant to want to trade him the toolbox on the back of the Ranger for a tile saw defendant had previously given to Woodard as collateral for a loan. Woodard refused. Within a week or so before this meeting, defendant had complained to Woodard that Palmer was mistreating him; "he was very angry at her" and "called her a cunt." Defendant did not mention her that evening, however. And Woodard did not see scratches on defendant's face that night.

The jury also heard testimony from Juan Calhoun, a witness whom the prosecution described as "probably not as accurate as some of the other[]" witnesses regarding the timeline. As the court put it (outside the presence of the jury), "[i]t seems to me that the basic facts were pretty consistent with Mr. Calhoun. The timeline was a bit confusing."

Calhoun testified that he encountered defendant the morning of either Friday, April 16, or Saturday, April 17; closer to the relevant events, he had said the 17th. Calhoun and defendant agreed to rent a motel room later that day, to "buy some drugs and get a few girls and get high in the room." Among other things, Calhoun testified that defendant left the room for several hours, returning with "a couple of scratches or some type of blood marks on his face." According to Calhoun, defendant disclosed "that he had beat the pussy up or something like that."

Calhoun understood defendant's terminology to be "like a street slang, stating that he might have had aggressive sex with his wife or whatever." Defendant had previously "mentioned something about his wife, that they weren't together." Calhoun was not certain, but thought defendant "said he broke in." At trial, Calhoun seemed not to recall telling detectives that

defendant returned at night with a bag of jewelry. He did testify, however, that he saw defendant with what appeared to be women's jewelry not long after. Mengoni also testified that, in May 2004, Calhoun told him defendant returned with jewelry and said something about "[b]eating some pussy up real bad." Despite some inconsistencies in the timeline evidence adduced at trial, nothing suggested that defendant returned to the motel room later than the early morning of Sunday, April 18.

e. Palmer's apartment

Palmer lived in a studio apartment. At roughly 8 p.m. on April 18 — the day after Tammy last saw Palmer alive — Tammy and her husband entered the apartment with the assistance of a locksmith. Tammy (and, it seems, her husband) remained inside for no more than 10 minutes. Her brother Robert and his wife also spent a few minutes walking through the apartment that night, at some point after Tammy departed.

As relevant here, Tammy noticed several things about the condition of the apartment. The apartment smelled unusually strongly of cleaning product. A fan was on. No coffee cup or water glass appeared where Palmer usually left one. The glasses that Palmer needed for driving were on top of a table, folded; Palmer's habit was to leave them unfolded, so that she could put them on more easily with one hand when crocheting. Some of Palmer's bedding was missing. Finally, Tammy saw a pink vibrator in the area of the bathroom sink. Embarrassed, and aware her brother Robert was en route, Tammy wrapped the vibrator in toilet paper and either she or her husband hid it in an under-sink cabinet. Otherwise, Tammy testified, she "didn't touch anything."

Officers' initial, later-occurring inspection of the apartment did not lead them to believe that Palmer had been killed there. "This wasn't a typical-looking crime scene," one officer testified; "This was just a pretty clean apartment."

f. Events preceding identification of Palmer's body

On Tuesday, April 20, defendant sold his Bronco truck (not the Ranger loaned to Palmer) to a used car dealer for $500. The dealer, who at trial recalled seeing defendant only once before the transaction, thought defendant seemed "very upset"; "basically he was saying that he wanted to kill himself." Defendant left some personal effects at the dealership. The dealer's understanding was that defendant would retrieve them, presumably the same day. Defendant never returned.

Defendant went back to Woodard's home on foot at about that time. He seemed "very upset" and told Woodard "that he [that is, defendant] was gonna be on the news." Defendant developed a habit of appearing near Woodard's home "[p]ractically every day," sometimes with a shopping cart. "[H]e was mostly trying to get money." At some point, defendant told Woodard that defendant was "going to hell and he's gonna jump off a bridge."

On Wednesday, April 21, at around 10 p.m., an officer responding to a call was directed to a motel room. Defendant answered the door. The officer observed scratches on defendant's face. He detained defendant and brought him to a police station. A few hours later, at the station, photographs were taken of scratches on defendant's face and his inner left arm. Defendant was released later that day; that is, Thursday, April 22.

Also on April 22, detectives assigned to the missing persons division went to the dealership to which defendant sold his Bronco. The vehicle was impounded that day. A criminalist visually inspected the Bronco a few days later. Among other things, he saw a shovel, towels, and the restraining order naming defendant.

The missing persons detectives caused photographs to be taken of certain items that defendant left at the used car lot, but do not appear to have secured or retained those items at that time. At some point thereafter, the dealer placed defendant's belongings in a dumpster. A homicide detective retrieved miscellaneous papers from the dumpster, including receipts and what "looked like a resume for Paul Baker and some other items with his name on it." One of the roughly 15 receipts from Home Depot was dated March 27, 2004 and reflected a purchase of an item called "multi color" with a specified item number. Although the significance of that purchase was not apparent at this point in the investigation, trial testimony of a Home Depot employee and the president and CEO of a rope manufacturer tended to indicate that the item reflected on the receipt was rope of the kind found wrapped around Palmer's body when her remains were later discovered.

Law enforcement personnel searched Palmer's apartment several times before her body was identified. Carpet under a coffee table appeared to be stained with blood. Those areas tested preliminarily positive for blood using a phenolphthalein test, as did a small drop on the wall and a spot on a piece of furniture. A criminalist with special goggles and lighting also identified areas that may have been stained with semen on the front part of a couch cushion, down the front of the couch, and on the carpet at the base of the couch. The couch and carpet also

tested preliminarily positive for semen using an acid phosphatase test. The criminalist's testing did not enable him to determine how long the semen had been there. A pink vibrator was also collected from an under-sink cabinet.

Finally, Mengoni, whom defendant had given the stolen Escort, was charged with felony joyriding, and remained in custody until about Friday, May 7. Within a week of his release, likely in the range of the 11th to 14th, Mengoni encountered defendant while on a walk. Mengoni was angry about the arrest, especially because the car appeared to be connected to a missing person. Defendant assured him not to worry about it, saying that "nobody would . . . show up to court to press charges." If this conversation took place on or before May 14, as Mengoni recalled, then it occurred before Palmer's body was identified — and tended to show that defendant had special reason to believe that Palmer, then missing, would not be found alive.

g. Discovery and identification of Palmer's body

Palmer's unidentified body was found on May 11 in a desert area of Riverside County. Due to substantial decomposition, much of what remained was skeleton; at an autopsy performed the next day, she weighed 22 pounds. Palmer's fingers were rehydrated, and her prints compared to DMV records. She was identified on May 18 or 19, 2004.

Palmer's remains were found largely surrounded by foam padding. Two blankets were wrapped around her and held in place with a rope, "secur[ing] the body in kind of a fetal position or balled-up." Her jeans were unzipped and pulled down to her thighs, exposing her underwear (which was fully on). A sweatshirt was atop her chest between her arms. An unclasped bra was underneath her body. There were no

apparent signs of tearing on the jeans, underwear, sweatshirt, or bra.

Various items were found near Palmer's body. They included a dental chart bearing the name Judy Palmer; a Notice of Privacy Practices bearing the name Paul Baker; and a picture with the inscription, " 'Judy, I'll always love you, no matter what. I miss you very much. Love Paul B.' " Other items found nearby are discussed as relevant below.

Given the extent of decomposition, the doctor who performed Palmer's autopsy was unable to determine the cause or time of her death. "[T]here were no internal organs of any kind available," and "[t]he genitalia, the external genitalia and internal genitalia, were absent." Although it was possible that Palmer had been asphyxiated (or stabbed, or killed by blows to the body), the bindings around her appeared to be used so that her body would be easier to move. The doctor did convey, however, that he did not think Palmer died of natural causes; "[t]he nature of the bindings and the way that the body was treated post mortem was — certainly suggests that it wasn't a natural death." The doctor also opined that the condition of her body was consistent with her having died on April 17 or early April 18; been left in the desert soon thereafter; and having remained there until May 11.

h. Defendant's arrest and aftermath

Officers arrested defendant on May 20, 2004, at about 1:00 p.m. Items of his property recovered soon after included an acknowledgement of receipt regarding a mental health agency's notice of privacy practices. The prosecution argued that this document was identical to the notice found near Palmer's body, except that defendant had signed the version found near

Palmer. None of the items collected appeared to have blood on them.

The missing Ford Ranger loaned to Palmer received several parking citations in the days that followed defendant's May 20 arrest — the first shortly after midnight on May 21, the last on June 1. On June 2, an officer recovered the Ford Ranger and had it impounded. An LAPD criminalist searched the vehicle two days later. The Ranger did not contain the toolbox defendant attempted to trade to Woodard on the night Palmer disappeared. The criminalist did, however, find "plant material" in the bed of the truck and inside the cab on the floor near the passenger seat. The LAPD gave four samples of plant material to a botanist; two from the truck, and two from a location in Riverside near where Palmer's body was found. The botanist testified that the samples appeared to be tamarix aphylla, a distinctive, uncommon plant found in only a few regions of California, including Riverside. The samples could have come from the same plant, but the botanist was not certain they did.

Finally, Tammy went to clean out Palmer's apartment after Palmer's body was identified. The person she was with leaned against the couch, and what appeared to be a crack pipe fell out. Tammy's husband turned the pipe over to a detective.

i. Forensic evidence

Several items collected during the investigation of this case were submitted for scientific analysis. Defendant contends that some of the results of that analysis were improperly admitted at trial, because the analysts were not available for cross-examination. (See *post*, pt. II.E.) This section describes only analysis performed by three criminalists who testified at trial.

One criminalist observed sperm cells on cuttings from Palmer's rug and couch, as well as on a swab of the vibrator. The cutting from the rug had "a lot of sperm"; "approximately 100 to 250 sperm per . . . three microliter drop." The swab of the vibrator had only two. The analyst could not determine the age of any seminal fluid on the rug, the couch, or the vibrator.

A different criminalist screened several items for seminal fluid using an acid phosphatase test. A towel in a bag found near Palmer's body screened positive, as did an aqua-colored blanket in a different bag nearby. Microscopic examination of extractions from those items revealed sperm cells. The groin area of Palmer's underwear screened negative for seminal fluid, but a later screening of other portions of the underwear was "positive, in that it changed color[,] [b]ut inconclusive, in that it was different than what I typically see." The criminalist did not evaluate the relevant areas microscopically.

The third criminalist specialized in DNA analysis. She testified that a sock found in a bag near Palmer's body matched the DNA profile the criminalist created regarding Palmer, as did various other items.

The criminalist also created a profile of defendant's DNA. Among other things, she compared that profile to sperm and nonsperm fractions extracted from the aqua-colored blanket. She found defendant's profile in both the sperm and nonsperm fractions. A cigarette butt from the same bag also matched defendant's profile, as did a sperm fraction extracted from a towel cutting.

The criminalist understood the frequency with which defendant's profile would appear in the population to be "in the magnitudes of trillions." The profile common to defendant and

the cigarette butt would be expected to appear in one in 120 trillion Caucasians. The more detailed profile common to defendant and the sperm fraction from the towel would be expected to appear in one in 740 quadrillion Caucasians.

The criminalist could not indicate when defendant's sperm was secreted on the blanket or the towel. Sperm cells could remain even after exposure to sunlight or washing in detergent, "[b]ut it's also very possible" for sperm to be removed; "[i]f you have a lot, there could be a lot left behind. If there wasn't a lot, it could be completely washed away." Each subsequent washing diminishes the likelihood of finding sperm. Additionally, "[t]he constituent of the semen is the acid phosphatase, which is water soluble and it tends to wash out." The criminalist "would not expect to get a positive result with acid phosphatase, which is the enzyme that is water soluble," if underwear had been exposed to semen and laundered.

Finally, as noteworthy here, the criminalist extracted a sperm fraction from cuttings of Palmer's underwear, though she did not observe any sperm visually. Although the criminalist could only create a partial profile from that fraction, the profile was consistent with defendant; he could "[]not be excluded." The cuttings were forwarded to another lab for a different type of DNA testing.

j. Evidence of uncharged offenses

In addition to the charged offenses, the prosecution also introduced evidence of uncharged offenses that defendant allegedly committed against other women. Defendant contends that the evidence of uncharged offenses was unduly prejudicial. (See Evid. Code, § 352.) That evidence is discussed as relevant

below. (See *post*, pt. II.D.) The balance of this background section describes evidence regarding other charged offenses.

k. Lorna T. (Count 10)

The jury convicted defendant of one count of sodomy by force regarding Lorna T. She met defendant at an A.A. meeting in approximately the summer of 1994. They started dating about a month later, dated intermittently for about five months, and renewed their relationship sometime thereafter. During the time in which they were dating, defendant demonstrated an interest in pornographic films featuring anal sex and "whips and chains."

One evening in mid-December 1995, defendant attacked Lorna T. in her bedroom. They were lying naked on her bed shortly before she was to leave for a Christmas party when defendant said " '[g]ive me some from the back.' " After Lorna T. repeatedly refused, he pushed her from her side onto her stomach; held her down by the back of her neck (pressing her face into the bed and making it difficult for her to breathe); and forced her to have anal sex with him. Lorna testified that "[i]t hurt like he was just ripping me, like, you know, just forcible, forcing his self real hard . . . ." After defendant stopped, she said what he did was wrong and asked him why he did it. He said nothing, got dressed, and left. Lorna feared that if she called the police, "he would retaliate."

l. Kathleen S. (Counts 6, 7, and 16)

Defendant was convicted of three offenses regarding Kathleen S.: forcible rape (count 6) and forcible sodomy (count 7), regarding an incident in June 1997, and forcible sodomy (count 16), regarding an incident in April or May 1997.

Kathleen met defendant in late 1996 or early 1997. She was homeless at the time and struggling with drugs and alcohol. Defendant was living in his van and offered to let her stay with him, which she did. They began an intimate relationship.

One night in April or May 1997, they were inside the van. Defendant told her that he "wanted it from behind," which she understood to mean that "he wanted to anally penetrate me." She told him that she did not want to engage in anal sex. In response, "he took it anyway." He told her that "he does this to all of his women." She did not report the incident to the police that night, "[p]robably because of the life I was living at the time and fear of going back into the streets."

At some point, Kathleen was offered a job as a dog groomer and inquired about a job for defendant. Defendant was hired. Her employer eventually discovered that defendant had a background as a handyperson. The employer offered to let defendant and Kathleen live in the employer's garage in exchange for defendant working on the employer's house on weekends. Defendant and Kathleen accepted the offer and moved into the garage on June 2, 1997.

The day they moved in, they went to a nearby bar. Kathleen invited a friend to join them. Defendant knew about the invitation but found out only after it had been extended that the friend was an ex-boyfriend of Kathleen's. After they returned to the garage, defendant became angry and assaulted her. He bit her thumb, hit her face, and threw her into the garage door. Testimony from neighbors who heard noises coming from the garage corroborated that a violent confrontation occurred.

Kathleen could not remember much of the event. But she vaguely recalled being on a mattress on her stomach and felt pain in her anal and vaginal regions. Based on her injuries, she concluded that she had been raped and sodomized.

Kathleen also recalled defendant telling her "that he was gonna take me out to the desert and tie me up and have his friends rape and kill me." She further testified that at some point "he got ahold of my wrist, I believe, and proceeded to drag me out of the garage saying that I'm gonna take you in the house and show you what I've done to you" — adding, "I knew he would kill me if he took me in that house." In response to her asking why he was doing this to her, "he said he does it to all of his women, that same remark." As he dragged her out of the garage, she broke free and started running. "I believe at that time I heard someone say it was the police."

A detective who arrived at the scene testified. He saw Kathleen running out of the garage, followed by defendant. "The right side of her face was completely swollen, her eye swollen shut, red and puffy, and she was bleeding from her mouth." "As she ran past me initially she screamed 'don't let him get me again. Don't let them take me to the desert.' " He believed "she used the term 'he fucked me in the ass.' " She was transported by ambulance to a hospital.

Kathleen recalled "a few bodies . . . trying to restrain me," and then "waking up in the hospital." Her memory of her time in the hospital is "very vague." "I remember speaking to somebody who was telling me it was okay, that the police had helped me and the doctor needed to examine me."

The doctor who examined Kathleen on the morning of June 3, 1997, testified. He explained that he did not remember

the examination, but he testified based on records prepared around that time. According to those records, she was "disheveled, tearful, [and] cooperative." "[S]he had pain in her face and jaw area," as well as injuries around those areas. "[S]he stated she was beaten up and raped by live-in boyfriend Paul Baker earlier that evening — that night. She said that he tied her up, both hands and feet, 'punched and kicked me all over,' put his penis in her mouth, vagina and rectum multiple times." An injury on her right thumb appeared to be a possible human bite mark. The doctor performed a pelvic exam. She had "a small bruise on the right labia" and "an area around her rectum that looked like it might be superficial abrasion." The doctor believed her injuries "were consistent with both physical and sexual assault" and supported her description of the attack. He did not notice any tearing or bleeding of her rectum. He could not state exactly when the punctate wound was inflicted and "couldn't say it was yesterday or today" regarding the possible abrasion near the rectum. The sperm the doctor observed could have been a few days old.

m. Laura M. (Counts 9 and 13)

Defendant was charged with, but acquitted of, two counts of forcible sodomy regarding Laura M. She and defendant met through a mutual acquaintance in 1996 and, intermittently, had consensual intimate relations until sometime in 2001. The first charged incident allegedly occurred at a hotel in December 2000. Laura testified that defendant tied her to a bed post and forced her to have anal sex with him. The second charged incident allegedly occurred at Laura M.'s home in January 2001. She testified that he pulled her out of the shower, threw her to the floor, and again forced her to have anal sex with him.

Cross-examination focused primarily on Laura M.'s alcohol use and gaps in her memory. The jury also heard testimony that Laura M. had been convicted of several misdemeanors, including making a false report to a public agency or peace officer.

n. Susanne K. (Count 11)

Defendant was charged with, but acquitted of, one count of forcible rape regarding Susanne K. She and defendant met through A.A. in approximately February 2001 and went on a first date in May of that year. They ended up at her home. Susanne K. testified that, while there, defendant had sexual intercourse with her against her will, despite her repeatedly telling him she did not want to do so. Because Susanne K. passed away before trial, the jury did not have an opportunity to hear her testify; it heard a reading of her testimony from the preliminary hearing in this case.

2. Defense case

The defense called several witnesses relevant to the offenses concerning Laura M. As noted, the jury found defendant not guilty of those offenses.

The defense also elicited various pieces of information regarding the offenses related to Palmer. Among other things, questioning probed officers' interviews of Calhoun and whether officers had assisted Mengoni in exchange for his testimony. Various other details concerning the investigation were also elicited; for example, that Palmer's apartment door did not appear to be damaged about a week after her disappearance, and that Woodard said he never reported seeing scratches on defendant's face. Much of the testimony retraced investigators'

steps, including a conversation in which a victim of an uncharged offense did not report that offense.

B. Penalty Phase

1. Prosecution case

The prosecution offered additional photographs documenting Kathleen S.'s injuries arising from the incident in the garage. It also offered certified records indicating that defendant had been charged with and convicted of possession of a controlled substance (cocaine base) in June 1999.

Palmer's daughter-in-law Vicki R. testified. She described Palmer as "like my mom" and a doting grandmother to Vicki's children. Vicki's daughter "totally shut down" after Palmer's death, as did Vicki's husband Robert. Vicki's two younger sons, she added, also missed their grandmother; one of them testified to similar effect, as did one of Palmer's grandsons through her daughter Tammy. When asked what she missed most about Palmer, Vicki replied, "[h]er love, her support." Palmer's son-in-law Casey G., Tammy's husband, also described Palmer as "a great mother-in-law" who "helped so much in our lives."

Palmer's son Robert described her as a "lighthearted, really easygoing" person who "wanted to help . . . and listen to everybody." Her death had changed him; "you just don't know who you can trust, you know. When you learn that somebody who acts like they're your friend and then waits until your most sensitive moment and they want to do such a thing to you . . . ." Knowing how Palmer died made it harder for him to enjoy memories of their time together.

Palmer's daughter Tammy explained that Palmer "had a clean bill of health" and had been focused on her well-being because "[s]he wanted to be around to watch her grandkids grow

up, go to college." When Tammy was a young child, she was ridiculed due to a facial birth defect. Palmer counseled her concerning how to deal with the situation and Tammy "never had any problems after that." They remained close even during Tammy's teenage years; "[W]e never had any fallouts. We never had any of that teenage bicker back and forth . . . . I never went through that. I had so much respect for her." Although Palmer had suffered through a period of "deep depression" when her then twelve-year-old son was struck by a car and killed, Palmer and Tammy's time together was largely filled with jokes and laughter. Palmer was Tammy's best friend.

Tammy also described her emotions after Palmer disappeared. "I went from frantic to anger, back to frantic" when Palmer was missing, Tammy testified, and "didn't sleep for three weeks." Learning that her mother had been murdered made her and her ten-year-old son very angry. Tammy was different now; "I don't trust anybody." "I feel about 20, 30 years older. . . . [I]t took me almost a year to stop shaking." Her memories of her mother were also tarnished. "I wish when I had those good memories that they didn't have a picture of her at the desert or how she was killed in her apartment. But it always finishes — my good memories always finish with that picture."

People who knew Palmer through A.A. also described her importance to that community. "She was an extremely well-respected human being as far as her willingness to go to almost any lengths to help anybody," one said. Another described Palmer as "the most giving, understanding, dedicated, wonderful, generous, nonjudgmental, caring person." A third recalled Palmer's sobriety even after Palmer's twelve-year-old son was killed. Approximately a day after her son's death, Palmer shared the news; " [']if you are hurting,['] [Palmer] said,

[']I'm here to tell you that there's nothing so awful in your life that you have to drink again.[']" "And I remember thinking," the witness continued, "if this woman can lose her child right in front of her, then I certainly don't ever have to have another drink. And that's kept me sober . . .[,] that knowledge that if she can stay sober through that, well then I can stay sober."

2. Defense case

The defense case had two main components. The first involved family members describing defendant's difficult childhood. The second was the expert testimony of Dr. Jay Adams, a clinical psychologist.

Defendant's older sister Penny explained that their biological father left their household when she was about five years old. They grew up with an aloof stepfather, one of the five husbands their mother had had by the time of trial. The household, which at times included Penny, defendant, two of their siblings, five step siblings, and a child born to her mother and stepfather, struggled financially. She did not recall any of the children ever visiting a dentist before she turned 18, the age at which she left home. Sometimes they did not have food, a phone, electricity, or oil for heat and warm water during cold Pennsylvania winters. The children bathed only once per week and often wore unwashed clothing.

Penny was roughly 9 or 10 years old when she became aware that her mother and stepfather had problems with alcohol. When her mother was very drunk, "she was abusive. I mean, she was a very angry drunk." She would hit the children with "anything available. A wooden spoon, a belt, a book." "Sometimes . . . she would go into a rage and wouldn't be able to stop." The stepfather would hit them, too; "[h]e was a very

muscular man" who "wouldn't hold back." Their mother and stepfather would also scream at each other and fight physically. At one point Penny called the police, afraid that the stepfather would kill her mother. The police arrived and asked the stepfather — a former police officer — whether they needed to come in. The stepfather said no. The police "just turned around and walked away."

Defendant was also exposed to sexual content at a young age. When the family was in the living room watching television, Penny explained, their stepfather "would put his arm around [their mother] and put his hand down the shirt and feel her breasts." There were pornographic books and magazines around the house, accessible to all of the children. Defendant's half brother testified that defendant's mother and stepfather would watch pornographic videos while the children were around. There was also evidence tending to suggest that defendant may have been aware of his mother's intimate activities with other men.

Defendant, Penny testified, wet his bed "to a very late age," possibly even as a teenager. Her mother and stepfather beat him in response. Sometimes their stepfather would hit the children so hard that they would fall to the ground, and then, while on the ground, hit them more. She never heard him apologize. He left the family when defendant was approximately nine years old. Defendant was largely unsupervised from then until he was about 14 years old, when his mother relinquished her custody of him at a police station. Cross-examination elicited some of his misbehavior to that point, without defense objection.

Defendant's younger sister June gave similar testimony about her mother and stepfather's conduct, including daily alcohol consumption and frequent violence. His half brother Clyde also testified similarly. June recalled defendant having seizures and sometimes sleepwalking naked with his stuffed monkey. She recalled that he was hit more than the other children. On at least two occasions, she saw the stepfather pick defendant up by the neck when defendant was seven or eight years old. She left the house for good when she was 14; "I couldn't handle it anymore." June also conveyed that defendant struggled with drugs "on and off through his entire life." Cross-examination of June addressed an incident in which defendant stole from his sister, potentially to obtain drugs. Among other things, cross-examination of Clyde elicited, without objection, that defendant threatened to kill Clyde when defendant was roughly 13 or 14 years old.

Defendant's mother testified. She had not seen him in about 15 or 20 years. She testified that defendant's biological father hit her, including while she was pregnant with defendant, and also hit defendant, even though defendant was only a few years old before the father left the family. After defendant's biological father left, he never called to speak with the children, never sent them cards, and paid child support only once. Defendant's bedwetting became worse after his father left, and worse again when his mother remarried. She and his stepfather would discipline the children physically. When defendant was about eight years old, she took him to counseling at his school's suggestion. The stepfather attended once; the counselor said "he was part of the problem," and he refused to attend again.

Defendant's mother related that she and defendant's stepfather would drink every day. With or without alcohol, he

would sometimes get very angry and hit her (including in front of the children) or hit the children themselves. At one point she got carried away hitting defendant and "[t]he rest of the kids and the dog" had to pull her off him. She eventually had defendant declared incorrigible and gave him up after he threatened her and her daughter. She did not visit him regularly "because it was a long drive" and she had to work.

Defendant's mother also described some of defendant's other difficulties as a child. He was diagnosed with a form of epilepsy. Even at the age of five or six, he would drink his mother and stepfather's alcohol — conduct for which he was not disciplined. He also struggled with schoolwork. Without objection, cross-examination elicited that defendant had committed theft, both as an adult (from his mother) and as a child (from others).

Dr. Adams thought it "pretty clear" that defendant "suffered from major [recurrent] depression" and "less clear, but I think pretty likely, there is a diagnosis of polysubstance dependency, which means that the person has used and become dependent upon at least three substances." Her testimony conveyed much of the information on which she relied in reaching those conclusions. She also identified indicia of potential dissociative disorder, generalized anxiety disorder, and post-traumatic stress disorder. She thought defendant "clearly" met the criteria for antisocial personality disorder, with features of borderline personality disorder.

Difficult upbringings, she explained, can prevent individuals from developing the skills necessary to cope with stress in a nondestructive way. She opined that defendant's relationship with women was characterized by hostile

dependency; he "sought out closeness with women" but "doesn't have the skills to maintain a relationship." She anticipated "that he would have problems coping with stress, that he would easily become overwhelmed and not have developed the skills to deal with stress very well." Regarding rejection, she thought "he would find rejection very damaging and very psychologically threatening," the type of threat to which he might impulsively "react very aggressively."

Although at some point another mental health professional had identified defendant as malingering, and it was "certainly possible" that there had "been instances where he malingered," Dr. Adams emphasized that just "because someone is malingering in a particular instance does not necessarily mean that they don't have other psychiatric diagnoses."

Cross-examination elicited, among other things, that Dr. Adams did not include her diagnoses in her written report, and that those diagnoses were not made available to the prosecution until the eve of her testimony. It also probed the reliability of the bases for her testimony, such as self-reported information and documents prepared by a defense mitigation specialist. The prosecution also sought to distinguish any impulse control issues defendant might suffer from the assertedly planned nature of the murder.

3. Rebuttal

The prosecution called one rebuttal witness, John Gaynor, a group care counselor at a facility at which defendant arrived in 1977. Gaynor had prepared a memorandum on which the defense expert relied. His testimony clarified an ambiguous passage in the document. As clarified, the thrust of the passage was that defendant could behave himself if incentivized to do so

but had "little sense of personal motivation . . . to control and manage his behavior."

II. DISCUSSION

A. Denial of *Batson/Wheeler* Motion

"Peremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender." (*People v. Armstrong* (2019) 6 Cal.5th 735, 765 (*Armstrong*); see *Batson v. Kentucky* (1986) 476 U.S. 79, 97; *People v. Wheeler* (1978) 22 Cal.3d 258, 276 (*Wheeler*).) "Excluding even a single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal." (*People v. Huggins* (2006) 38 Cal.4th 175, 227.) When a party opposing a peremptory strike makes a prima facie case that the strike was motivated by impermissible discrimination (step 1), the proponent of the strike must offer a nondiscriminatory reason for that challenge (step 2). (*Armstrong*, at p. 765.) The question then becomes (step 3) whether the opponent of the peremptory challenge has shown it " 'more likely than not that the challenge was improperly motivated.' " (*Id.*, at p. 766; see also *Purkett v. Elem* (1995) 514 U.S. 765, 767 (*Purkett*).)

The prosecution in this case peremptorily struck both prospective jurors who identified themselves as Black and had not previously been excused for hardship or cause: Prospective Jurors R.T. (No. 7731) and T.P. (No. 9049). The trial court found a prima facie case of discrimination based solely on "sheer numbers." The prosecutor explained that she struck both prospective jurors because she thought it would be difficult for them to impose the death penalty, relying in part on R.T.'s demeanor during voir dire. Defense counsel did not dispute the sincerity of the prosecutor's explanation, nor the accuracy of the

observations underlying it. The trial court found that the prosecutor was "credible" and "that her observations are based on race neutral reasons." We affirm the denial of the *Batson/Wheeler* motion.

1. Background

a. Prospective Juror R.T. (No. 7731)

Prospective Juror R.T. described herself in her juror questionnaire as a 51-year-old Black woman. She wrote that she "believe[d] in the death penalty" and was "moderately in favor" of it. She felt comfortable serving as a juror in a capital case, asserting that she would be able to vote for death if appropriate under the facts and the court's instructions. The death penalty was worse than life imprisonment, she added, because "[a] life is ended." Prospective Juror R.T. indicated that she did not belong to any organization that advocates for or against the death penalty. The religious organization to which she belonged, she added, does not take a position on the issue.

The People did not seek to excuse Prospective Juror R.T. for cause based on her questionnaire. During *Hovey* voir dire (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80), defense counsel elicited that R.T. could not indicate whether she preferred a sentence of death or life imprisonment because she "ha[dn't] heard any facts"; that she would be open to listening to mitigating and aggravating evidence; and in particular, that evidence about the defendant's life "would help" in selecting a penalty. *Hovey* voir dire continued:

"[PROSECUTION:] Okay. I want you to imagine that you've gone through the whole trial, you've gone through the penalty phase, you considered the mitigating and aggravating circumstances and based — based upon all of that you've

determined that in this particular case death was an appropriate penalty. I want you to imagine that you're sitting in the jury box and look at the defendant and tell us if you would feel comfortable or that you could announce your verdict is death? Could you do that, looking at the defendant right here and now?

"[R.T.:] *I really don't know.* [¶] *I don't know if I'd be comfortable or if I'd be scared.* [¶] *I don't know.*

"[PROSECUTION:] Okay. Because you don't know, because you have those feelings, do you think it would be difficult for you to sit on a trial of this nature and impose the death penalty if you believe it is appropriate to do so based upon everything you've heard?

"[R.T.] *That's a possibility.*

"[PROSECUTION:] Do you think it would be impossible for you to impose the death penalty because of those feelings of uncertainty?

"[R.T.:] No." (Italics added.)

The court then inquired whether R.T. was open to weighing mitigating and aggravating factors at the penalty phase to reach an appropriate verdict ("Yes," she responded); whether that verdict could be life without the possibility of parole or the death penalty ("Yes"); and whether she was open to both possible sentences ("Yes, I am"). Both parties passed for cause. The prosecution later exercised a peremptory challenge against R.T. The defense did not object at that time.

b. Prospective Juror T.P. (No. 9049)

Prospective Juror T.P. described himself on his juror questionnaire as a 44-year-old Black man. He wrote that he was

"neutral" about the death penalty and thought it "might be" necessary "in some cases of extreme violence." He also conveyed, however, that he viewed life imprisonment as a worse punishment than death. When asked whether he belonged to any organization that takes a position for or against the death penalty, he answered "no." But when asked whether his religious organization had a view on the death penalty, he said "yes"; namely, that "God is the only one to give life and take life," a view with which he agreed. Prospective Juror T.P. indicated that he was comfortable serving as a juror in a capital case and would not automatically vote for or against death. But he also said that he could *not* see himself "in the appropriate case choosing the death penalty instead of life in prison without the possibility of parole."

During *Hovey* voir dire, the court and the parties probed some of these apparent inconsistencies. When the court asked why T.P. did not know whether he could impose the death penalty, T.P. replied, "I don't think — I think that belongs to a higher authority than myself. I don't think I'm — I should be one to decide a man's life." When asked "are you against the death penalty," T.P. replied, "Yes, I am." When pressed about whether he could impose the death penalty, T.P. variously indicated: "Well, it's sort of kind of a mixed feeling with it, you know"; "If somebody's found guilty beyond a reasonable doubt, I think maybe so, yeah"; and that he could impose death "[i]f it's very appropriate." When informed by the prosecution that felony murder does not require intent to kill and asked whether he would "absolutely refuse to impose [the] death penalty if you believed the defendant did not intend to kill," T.P. replied, "Right. In that case, I don't think death would be merited if it's unintentional," regardless of any aggravating circumstances.

Prospective Juror T.P. had also indicated, however, that he could follow the court's instructions and be open to imposing the death penalty.

The prosecutor challenged T.P. for cause "based upon the fact that he could not impose the death penalty . . . in this present case," citing T.P.'s unwillingness to impose death absent proof of intent to kill. The court denied the challenge: "Again, I have a problem with the juror not being familiar with all the facts of the case, not having heard the case, not being given the full instruction under the law as to what felony murder is. I don't think I can excuse him for cause based upon that limited inquiry. I just think it would be improper. So he'll be retained." The prosecution later exercised a peremptory challenge against Prospective Juror T.P.

c. Objection and ruling

Immediately after the prosecution struck Prospective Juror T.P., the defense raised an objection "in the nature of a [state law] *Wheeler* motion," which the court understood to raise a federal *Batson* claim as well. (Cf. *People v. Williams* (2006) 40 Cal.4th 287, 310 & fn. 6 [holding, even after *Johnson v. California* (2005) 545 U.S. 162, that a *Wheeler* motion preserved a *Batson* claim on appeal].) This colloquy followed:

"[DEFENSE]: . . . [F]rom my recollection and observations, there are only two black jurors in the venire and the prosecution has moved to excuse the two and I believe that qualifies as a cognizable group and they should have to show good cause as to why they would do such a thing.

"THE COURT: I'm making the same observations. There were two blacks left in the jury, one female and one male, both [of] which have now been exercised and excused by the people,

Juror No. 9049, and Juror No. 7731 who was a female. [¶] Based upon that, there are no additional black jurors left in the venire and those are the only two exercised by the [P]eople. [¶] The court is going to find a prima facie case — well, before I do that, I would like the [P]eople to offer an explanation as to the excuse for these two jurors.

"[PROSECUTION]: We weren't in the position to pull out their questionnaires to get verbatim quotes about what they had said. The court's made a prima facie finding —

"THE COURT: Not yet.

"[PROSECUTION]: Each of the two African American jurors who were excused expressed extreme difficulty in imposing the death penalty, which is a race neutral reason for exercising a preemptory. The lady juror who was . . . the people's fourth preemptory challenge, her body language was extremely unreceptive both to the prosecution and the idea of having to impose the death penalty and she expressed verbally that she'd have a great deal of difficulty in doing it. With regard to the prospective alternate whom the [P]eople just kicked, I believe he wrote some extremely strong answers in his questionnaire in opposition to the death penalty.

"The decisional law . . . makes it clear that the inability to impose the death penalty or even equivocation with regard to comfort in imposing the death penalty are race neutral rationales for kicking a juror.

"It's probably also worth stating because there's not only [w]hat's in the *Wheeler* arena, but also a related arena under the Sixth Amendment it's worth pointing out to make a full record that the defendant is a non-Hispanic Caucasian and that same description describes all of the victims. They would be what you

would call Anglo-Saxons with the exception of one woman who may be partly African American — who is a trivial witness to the case — I believe Lorna [T.] is. Everyone else appear to be a non-Hispanic Caucasian who is associated with this case as a witness. [¶] I only point that out in case there's going to be some Sixth Amendment challenge also.

"And, by the way, I do apologize, your honor, if the court needs stronger basis for the reason for kicking those two jurors, I'd have to get out their questionnaires, which may take a moment or two, and it would have to happen in front of the jurors. If that needs to occur, perhaps we can ask the jury to step outside.

"THE COURT: The court does find a prima facie case based upon the sheer numbers of both African American or black jurors being excused; however, in listening to the explanations given by counsel, I presume they would be the same.

"[PROSECUTION]: Yes.

"THE COURT: They appear to be race neutral. [¶] There are no racial issues in this case that I am aware of, which doesn't necessarily defeat a *Wheeler Batson* motion, but I find that [the prosecutor] Ms. Ford is credible, that her observations are based on race neutral reasons that are proper challenges — or proper preemptory challenges.

"[PROSECUTION]: Your honor, once the jury has been let go, can I ask to raise this topic again and bring out their questionnaires?

"THE COURT: Yes. . . . [¶] . . . You can augment the record later."

The court denied the *Batson/Wheeler* motion. The court later asked the prosecutor whether she wished to augment the record. She did so, offering details regarding her pattern of strikes and the prospective jurors' reactions to questions regarding the death penalty.

2. Analysis

Because the trial court found a prima facie case of racial discrimination and the prosecutor stated a reason for the strikes at issue, the question before us is whether defendant has shown it " 'more likely than not that' " at least one of the " 'challenge[s] was improperly motivated.' " (*Armstrong, supra,* 6 Cal.5th at p. 766; see *Flowers v. Mississippi* (2019) 588 U.S. __ [139 S.Ct. 2228, 2244] (*Flowers*) [" 'motivated in substantial part by discriminatory intent' "]; *Foster v. Chatman* (2016) 578 U.S. __ [136 S.Ct. 1737, 1747] (*Foster*); *Davis v. Ayala* (2015) 576 U.S. 257, 270 [135 S.Ct. 2187, 2199] (*Ayala*); *People v. Smith* (2018) 4 Cal.5th 1134, 1147.) "The existence or nonexistence of purposeful racial discrimination is a question of fact." (*People v. Lewis* (2008) 43 Cal.4th 415, 469.)

The answer to this factual question will ordinarily depend "on the subjective genuineness of the race-neutral reasons given for the peremptory challenge." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924, italics omitted.) A justification based on a mischaracterization of the record could reveal a discriminatory motive (e.g., *Foster, supra,* 136 S.Ct. at p. 1753), but might reflect a mere error of recollection (e.g., *People v. Hardy* (2018) 5 Cal.5th 56, 79 (*Hardy*); *People v. O'Malley* (2016) 62 Cal.4th 944, 979; *People v. Williams* (2013) 56 Cal.4th 630, 661; *People v. Elliott* (2012) 53 Cal.4th 535, 565; *People v. Jones* (2011) 51 Cal.4th 346, 366; *People v. Taylor* (2009) 47 Cal.4th 850, 896;

People v. Gutierrez (2002) 28 Cal.4th 1083, 1124). Likewise, a justification that is "implausible or fantastic . . . may (and probably will) be found to be pretext[ual]," yet even a "silly or superstitious" reason may be sincerely held. (*Purkett*, *supra*, 514 U.S. at p. 768; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1171 (*Gutierrez*); cf. *O'Malley*, at pp. 981–982 ["prosecutor's reliance on [prospective juror's] interest in amateur magic" did not "establish that [the prosecutor] acted with discriminatory intent"].) Of course, the factual basis for, and analytical strength of, a justification may shed significant light on the genuineness of that justification — and, thus, on the ultimate question of discrimination. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) But the force of the justification is significant only to the extent that it informs analysis of the ultimate question of discriminatory motivation. (*People v. Cruz* (2008) 44 Cal.4th 636, 660.)[1]

Given this framework, a trial court's ruling on that ultimate question is ordinarily reviewed with deference. " 'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.' " (*People v. Jones* (1997) 15 Cal.4th 119, 162.) "A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as

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[1] Theoretically, a justification might be a pretext for a nondiscriminatory reason; people may lie to advance other ends. (See, e.g., *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148.) But this technical exception is unlikely to matter often, if ever, and nothing suggests that it matters here.

the credibility of the prosecutor who exercised those strikes." (*Ayala, supra,* 135 S.Ct. at p. 2201; see *People v. Stevens* (2007) 41 Cal.4th 182, 198.) Thus, "[w]hen the trial court makes a sincere and reasoned effort to evaluate the [proffered] reasons, the reviewing court defers to its conclusions on appeal, and examines only whether substantial evidence supports them." (*People v. Melendez* (2016) 2 Cal.5th 1, 15.)

For the reasons discussed below, we conclude that the trial court made a sincere and reasoned effort to evaluate the genuineness of the prosecutor's stated reasons, and that substantial evidence supports its conclusion that the strikes were not discriminatory.

a. The trial court made a sincere and reasoned effort to evaluate the prosecutor's stated justifications

A court may make a sincere and reasoned effort to evaluate a peremptory challenge even if it does not provide a lengthy and detailed explanation for its ruling. (See, e.g., *People v. Smith, supra,* 4 Cal.5th at p. 1158; *People v. Jones, supra,* 51 Cal.4th at p. 361; *People v. Mills* (2010) 48 Cal.4th 158, 175–176; *People v. Lenix* (2008) 44 Cal.4th 602, 625–626.) Under our precedent, "[w]hen the trial court has inquired into the basis for an excusal, and a nondiscriminatory explanation has been provided, we . . . assume the court understands, and carries out, its duty to subject the proffered reasons to sincere and reasoned analysis, taking into account all the factors that bear on their credibility." (*People v. Mai* (2013) 57 Cal.4th 986, 1049, fn. 26; see also *id.*, at pp. 1053–1054; *Mills*, at p. 180; see also *People v. Williams* (2013) 56 Cal.4th 630, 699–701, 704–717 (dis. opn. of Liu, J.) [critiquing that precedent].)

That assumption can be overcome. When "the proffered reasons lack[] inherent plausibility or [are] contradicted by the record," the court's failure to probe, or to explain, may eliminate the basis for deference. (*Armstrong*, *supra*, 6 Cal.5th at p. 777; see *People v. Silva* (2001) 25 Cal.4th 345, 385.) Deference may also be inappropriate when the court evinces a misunderstanding of the legal inquiry. (See, e.g., *Gutierrez*, *supra*, 2 Cal.5th at p. 1172 ["court improperly cited a justification not offered by the prosecutor"]; *People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

The prosecution in this case sought to excuse both prospective jurors at issue based on their alleged reluctance to impose the death penalty. "A juror's reservations about imposing the death penalty are an acceptable race-neutral basis for exercising a peremptory." (*Armstrong*, *supra*, 6 Cal.5th at p. 770; see, e.g., *People v. Hayes* (1990) 52 Cal.3d 577, 604.)

The trial court made a sincere and reasoned effort " 'to evaluate the nondiscriminatory justifications offered.' " (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) Even before finding a prima facie case, the court signaled that it was attentive to this issue. As soon as the defense made its motion, the court indicated that it was "making the same observations" regarding the pattern of strikes — volunteering the sex and juror numbers of the prospective jurors at issue. When the prosecutor stated her reasons, the court did not "den[y] the motion without comment" (*People v. Turner* (1986) 42 Cal.3d 711, 727–728); it found "that her observations are based on race neutral reasons that are proper . . . peremptory challenges." Moreover, although the court did not separately discuss each of the two prospective jurors, it did speak to a "casewide factor[] that it found relevant" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 115);